Office-Supreme Court, U.S.
FILED
MAR 28 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1159

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

v.

SCENIC HUDSON PRESERVATION CONFERENCE, TOWN OF CORTLANDT, TOWN OF PUTNAM VALLEY, TOWN OF YORKTOWN, and FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 28, 1966

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Petitioner, Consolidated Edison Company of New York, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 29, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals below is reported in 354 F. 2d 608, and is printed in Appendix A hereto, *infra* p. 1a et seq.[1] The opinion and order of the Federal

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1. References herein to "Opinion, " refer to the pages of Appendix A.

Power Commission (hereinafter "FPC" or "Commission"), issuing a license (FPC Opinion No. 452, March 9, 1965) is reported at 33 F.P.C. 428 (1965), and is filed with this petition as part of the record below, Joint Appendix, p. 684. The initial decision of the Presiding Examiner in the FPC is reported in 33 F.P.C. 465 (1964) and is filed with this petition as part of the record below, Joint Appendix, p. 558.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Federal Power Act, Section 313(b), 16 U.S.C. 825 *l* (b).

Questions Presented

1. Is an administrative order invalid, under Sections 7(c) and 10(e) of the Administrative Procedure Act, for failure to make a formal record respecting a potentially relevant factual question which had not been put in issue by any party? With reference to the instant case, was it an error for the FPC to license the Cornwall hydroelectric project without compiling a formal record as to the unavailability of interconnected power sources as a substitute, when at no time during the hearing or prior to issuance of such license did any party contend such sources would provide a substitute and the evidence of record indicated that they would not?

2. Where an intervenor opposing an administrative order itself proffers no evidence on certain factual subjects, do Sections 7(c) and 10(e) of the Administrative

Procedure Act and Section 313(b) of the Federal Power Act permit a Court of Appeals to reverse such order at the behest of such intervenor, with directions that the administrative agency affirmatively search out and put in the record further testimony on such subjects? With reference to the instant case, where the FPC had found, based upon its own background and expertise, upon the response of other agencies to specific inquiries, and upon the testimony offered by applicant for the license that: a) the proposed project would not damage fish life; b) the cost of extended underground transmission would be prohibitively expensive and c) interconnected utilities do not provide an alternative source of power, must it also make a further formal record on these topics independent of that offered by applicant, notwithstanding that no other party has offered such evidence or suggested where it might be obtained?

3. Does an administrative order fail to meet the tests of the substantial evidence rule prescribed by Section 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act, solely because the evidence of record upon certain technical issues consists of testimony of witnesses, otherwise qualified, proffered by the petitioner for such order? With reference to the instant case, was it error for the FPC to credit the testimony of corporate officers of the applicant for the license on the issues of alternate power sources and costs of underground 345,000 volt transmission facilities, notwithstanding the fact that such officers were qualified and practicing engineers and the applicant was the only company which had ever constructed underground 345,000 volt transmission facilities.

4. Where an administrative agency has refused after close of hearings to reopen a proceeding for further testimony on a technical subject upon which the agency has substantial expertise and on which both the applicant and the opposing intervenor have submitted evidence, do Section 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act permit a Court of Appeals to reverse upon the ground that in its judgment the evidence of record is not "meaningful". With reference to the instant case, where the Commission after having heard testimony by witnesses for the applicant and an intervenor relative to the adequacy of gas turbines as an alternative source of power, concluded that they would not provide an adequate substitute source, and thereafter rejected the proffer of an additional witness on such subject made several months following the close of hearings upon the ground that the proffered testimony would at most constitute a disagreement among experts, was it error for the Court of Appeals to reverse upon its evaluation of the technical testimony of record as not being "meaningful" although failing to find that the testimony in the record did not constitute "substantial evidence".

5. Did the action taken by the Court of Appeals below in receiving and avowedly basing its decision on matter not in the record before the agency, and substituting its judgment for that of an expert administrative body, constitute a deviation from the requirements of Sections 7(d) and 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act, and a substantial departure from the proper procedure to be followed by appellate courts? With reference to the instant case, was it error for the Court of Appeals to receive and

consider the record taken in a proceeding held subsequent to the issuance of the orders which were the subject of review, and unsworn statements subsequently offered before legislative committees, as affecting the adequacy of the record upon which the Commission had issued the orders being appealed from?

6. Did the action of the Court of Appeals, in setting aside the orders of the Federal Power Commission herein so exceed the authority of such court under the Administrative Procedure Act and the Federal Power Act that such action should be reversed and the Commission orders reinstated?

Statutes Involved

The statutory provisions involved are Sections 7(c), 7(d) and 10(e) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006(c), 1006(d) and 1009(e); and Sections 10(a), 313(a) and 313(b) of the Federal Power Act, 49 Stat. 842, 860, 16 U.S.C. 803(a), 825 *l* (a) and 825 *l* (b). They are printed in Appendix B, *infra,* p. 1b, et seq.

Statement

The Project

Petitioner, Consolidated Edison Company of New York, Inc. (sometimes hereinafter "Con Edison") is a public utility supplying electricity to New York City and an adjacent county (A. 156).[2] On January 29, 1963 it applied to the Federal Power Commission, pursuant to the Federal

2. References to the Joint Appendix in the Court of Appeals are herein cited as "A. ".

Power Act, 16 USC 792, *et seq.*, for a license to construct a pumped-storage hydroelectric plant[3] ("the project") on the west bank of the Hudson River at Cornwall, New York (A. 6) adjacent to Storm King Mountain (A. 421, 701).

The Hudson River would act as the lower reservoir; the upper reservoir would be situate slightly over a mile inland from the Hudson River and from Storm King Mountain, and would not be visible from the River (A. 421, 691, 701).

Transmission lines of 345,000 volt capacity would be required to connect the project with the remainder of the system. Such lines would be put under the River and an additional 1.6 miles underground on the east shore to a substation at Nelsonville, N. Y., which will not be visible from the River (A. 694, 704-705), then will go overhead through sparsely settled country (A. 715-721).

The Administrative Proceedings

On March 12, 1963, the Federal Power Commission duly published notice of the license application, and set April 29, 1963 as the last date to intervene (A. 6, 7, 488-489). On January 22, 1964, the Commission fixed hearings to commence February 25, 1964. On February 6, 1964, Scenic Hudson Preservation Conference, respondent herein ("Scenic Hudson"),[4] moved for leave to intervene,

3. In concept and operation the plant would be similar to that considered by this Court in *Federal Power Commission* v. *Union Electric Co.*, 381 U. S. 90, 92 (1965), (A. 687-690) except that a portion of this plant's capacity would be used for "spinning reserve" (p. 16 *infra*).

4. Various other of the respondents herein participated in certain of the procedural steps described; for convenience, however, reference herein will be confined to Scenic Hudson.

and such motion was granted in full on February 14, 1964. Hearings commenced February 25, 1964 with Con Edison presenting its *prima facie* case in a two day session. All parties, including Scenic Hudson, were given full opportunity to cross-examine and present evidence. Included in the record presented by Con Edison was the testimony of Dr. Alfred Perlmutter, Associate Professor of Biology at New York University, as to the adequacy of fish protection facilities (A. 39-58). Also included in the record were comments on fish protection submitted pursuant to FPC request by the United States Department of the Interior and the New York Water Resources Commission (A. 26-28, 493-497). Neither agency opposed the project or expressed the view that it would be unduly damaging to fish life.

Scenic Hudson successfully moved to postpone further hearings until May 4, 1964 in order to permit it to present the testimony of an expert engineering witness on the subject of possible sources of power which might be alternatives to the project. Hearings were held from May 4 through May 12, 1964, during which time Scenic Hudson's expert witness Fosdick testified and presented an exhibit with respect to alternative sources of power, including gas turbines[5] (A. 322-327, 332-368, 451). Con Edison had presented testimony noting the over-all advantages of the Cornwall Project as compared to other types of generation (A. 156-162); in addition testimony as to the inadequacy of the specific alternative power sources which had been suggested by Mr. Fosdick was given by a qualified practicing engineer who also happened

5. The term "gas turbines" refers to the fact that the turbine blades are turned by hot exhaust gases of jet engines; the jet engines may in turn be fueled either by natural gas or kerosene (A. 325, 355).

to be an officer of Con Edison (A. 10-12, 396-398). At this session testimony was given by another Company officer, also a qualified and experienced engineer, on the relative costs which would be incurred in putting project transmission lines underground (A. 189-90, 196-200, 231-234). No evidence on the issue of cost of underground lines, or the issue of fish protection, was offered by Scenic Hudson or any other intervenor at either the February or May 1964 hearings. Scenic Hudson made no further request for extension of time, or opportunity to present evidence, until after the license had issued.

On March 9, 1965, the FPC issued an opinion and order which granted a license for the project under certain terms and conditions (A. 685-776). The Commission found that the project would provide an economic benefit of not less than $12,000,000 annually over the only feasible alternative (A. 699, 708-713),[6] would have a "minimal" impact upon scenic resources while creating additional recreational opportunities (A. 705-708), and that its "advantages for power purposes far outweigh any negative considerations" (A. 707). It specifically considered and rejected gas turbines as an alternative (A. 713).

The Commission found that the project facilities would be adequate to protect fish life. However, in addition to imposing the standard license condition on the subject (which the Commission's rules require in every license and provides for future modification of project structures whenever found necessary and desirable), the Commission incorporated the suggestions of the Department of Interior as a special condition in the license (A. 725-729). The Commission, having viewed the site (A. 687), also

6. The Commission subsequently noted that this would benefit consumers in the Con Edison territory (A. 800).

found that requiring the transmission lines to be placed underground in the area beyond the view of the Hudson River would entail "extravagant additional costs * * * in view of the limited impact which the lines would have upon the area involved" (A. 722). This area, the Commission noted, was "generally wooded and sparsely settled" if the route proposed by Con Edison were followed, while if the route favored by the Commission staff "after extensive study of the entire area" were followed, the line would, except for one segment, "traverse a relatively underdeveloped and sparsely settled area" (A. 718-719). The Commission order of March 9, 1964 ordered further hearings regarding the specific transmission route (A. 723-725, 738), and, "in view of the opportunity offered" by such further hearings, provided for the receipt of further evidence at that time concerning the design of the fish protection devices (A. 729, 739). However, the remainder of the project works were found to be "desirable in the public interest" and a license issued therefor in the belief that the further hearings would not delay construction of the major works (A. 725).

On April 8, 1965, Scenic Hudson applied for rehearing of the March 9, 1965 order, and for reopening of the proceeding to introduce additional evidence by a Mr. Lurkis on gas turbines as an alternative power source (A. 777). (Such testimony had been offered on January 1965, seven months after close of the hearings, by a would-be intervenor, who did not seek review of the Commission's denial of its petition (A. vi, 652).) The Scenic Hudson motion was denied on May 6, 1965 (A. 790), the Commission stating that

> "The evidence regarding the alternatives establishes that the Cornwall project is far superior to any

possible alternative. At best, the evidence now offered would appear to consist of a disagreement between experts. At this stage of the proceeding in particular, the attempted introduction of additional evidence of this character provides no basis for a reopening of the record" (A. 795).

On April 26, 1965, Scenic Hudson moved that the additional hearings which the Commission had ordered to hear the limited issues of transmission line route and design of fish facilities, be broadened to reconsider the general issue of the effect of the project upon fish life and the issue of whether or not most of the transmission facilities from the project should go underground (A. 802). No evidence on either of these issues was proffered or described by such motion. This motion was denied May 6, 1965 (A. 812).

The Appellate Proceeding

On July 6, 1965, Scenic Hudson petitioned the United States Court of Appeals for the Second Circuit, pursuant to Section 313(b) of the Federal Power Act (16 USC, Section 825 *l* (b)) to set aside the orders of March 9, 1965 and both orders of May 6, 1965.

In its petition, Scenic Hudson raised no question as to whether there was substantial evidence underlying the March 9, 1965 licensing order, but took the position that the Commission was in error in failing to reopen the proceedings to hear Scenic Hudson's proffer of further testimony on gas turbines, and for failing to reopen to take further evidence on the issues of fish life and whether the project transmission lines should be placed underground. On these latter issues it offered no evidence, but took the stance that the Commission was under an

affirmative duty to seek such evidence as Scenic Hudson thought appropriate.

Scenic Hudson also moved that the transcript of the further hearings before the Commission on the issues of fish protective devices and transmission line route, which hearings had commenced on May 4, 1965 and continued until May 21, 1965, subsequent to the date of the last order under review, be made part of the record. This motion was granted by the Court of Appeals over objection of the Commission and Con Edison, and such record was received and considered (Opinion 3a), although no rehearing or review of the order which resulted from those hearings had been sought.

The Court of Appeals set aside all three orders under review, upon the general stated ground of incompleteness of record on alternative sources of power, effect on fish life, and the cost of transmission lines. It stated, notwithstanding 80 pages of testimony of record on alternative sources of power (R. 1171-1179, 1231-1296, 1408-1409, 1527-1529 [A. 322-327, 332-369, 376-377, 396-398])[7] including testimony showing that the subject had been studied by the Commission's staff (A. 290-291, 376-377), and 6 pages of the Commission's opinion on the subject (R. 2942-2947 [A. 708-714]) that, in the Court's opinion, the Commission "failed to make a thorough study of possible alternatives" to the project, and that the Court found no "meaningful" evidence which contradicts the proffered testimony supporting the gas turbine alternative (Opinion 6a, 18a). The testimony of Mr. Fosdick (Scenic Hudson's witness) on this subject was dismissed as "hastily pre-

7. "R." references are to pages of the transcript made before the FPC. All such references contained in this petition appear in the text of the Joint Appendix, wherein they are indicated by brackets.

pared", and, on the ground that "his direct testimony occupied less than ten pages of the record" was deemed "too scanty to meet the requirements of a full consideration of alternatives." (Opinion 21a) No reference was made by the Court to the 65 pages of testimony given by Mr. Fosdick on cross-examination (R. 1231-1296 [A. 332-368]). The testimony of Consolidated Edison's engineering witness was brushed aside as "self-serving". (Opinion 21a) The fact that Mr. Lurkis' testimony was not offered by Scenic Hudson until after the license issued was deemed irrelevant since the testimony had been offered by the other intervenor (who however had not petitioned for review of the denial of its application) two months prior to isssuance of the license, but 8 months after close of hearings. (Opinion 21a)

The Court of Appeals also held that, although Scenic Hudson at no time offered evidence on the subject, the Commission erred in that it "neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information" (but see the Commission's opinion, A. 710-711, and A. 19-20). The Court noted that the Commission's subsequent order of October 4, 1965 (on transmission line routes), had stated that ample spinning reserve would be available from Pennsylvania and New Jersey in the winter months. The Court rhetorically asked:

> "If interconnected power can replace the Storm King project in December, why was it not considered as a permanent alternative?" (Opinion 26a-27a)

The Court also held that there was "almost nothing in the record" with respect to underground transmission costs (but see A. 179, 189-194, 197-210, 225-234, 432-433)

and that the Commission did not weigh "the aesthetic advantages of underground transmission lines against the economic disadvantages" (but see the Commission's Opinion A. 704-705, 715-725).

With respect to fish life, the Court held, on the basis of certain statements made following the March 9, 1965 order (Opinion 30a-31a) that the Commission erred in giving weight to Dr. Perlmutter's testimony. (Opinion 30a-31a)

The Court's opinion required the Commission to "reexamine" all questions on which the Court found the evidence insufficient, and stated that notwithstanding the failure of any intervenor to offer evidence on such an issue, the Commission had an affirmative duty to make a record of its own on these issues.

Reasons for Granting the Writ

The decision of the Court of Appeals creates novel, and, it is submitted, dangerous departures from accepted standards of review of agency action. Petitioner believes that the decision is contrary to the specific dictates of the Federal Power Act and the Administrative Procedure Act, and unless such decision is reversed by this Court, and the Commission's orders reinstated, the opinion below endangers the administrative process.

The opinion below is not a mere factual misapplication of the substantial evidence rule laid down by Section 10(e) of the Administrative Procedure Act, and Section 313(b) of the Federal Power Act. Such misapplication, concededly, would not be subject to review by this Court under the doctrine of *Universal Camera Corp.* v.

NLRB, 340 U. S. 474 (1951). However, Petitioner believes that it is evident, on the face of the opinion below, that the Court of Appeals has created and applied new procedural requirements applicable to administrative adjudications which substantially supersede and modify both the substantial evidence rule and the rules relating to burden of proof which are prescribed by § 7(c) of the Administrative Procedure Act. The new rules for administrative procedure and review laid down by the opinion below throw a cloud on virtually every administrative proceeding, and would thwart the purpose and intent of the Administrative Procedure Act to simplify and expedite, as well as the express limits placed upon the Court's review of decisions of the FPC by Section 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act. The questions raised by the opinion below, if its stands, illustrate the problem.

a) Is an administrative order invalid for failure to make a formal record respecting every potentially relevant factual question, which question had not been put in issue by any party? Under Section 7(c) of the Administrative Procedure Act, may a party, by merely raising an issue without offering evidence thereon, throw upon the agency the affirmative burden of procuring such evidence and placing it in the record?

With respect to at least three subjects, i.e., fish protection, underground transmission costs, and alternative sources of power through interconnected facilities, the Court of Appeals imposed upon the Commission an affirmative duty to make a record which the Court would deem satisfactory, although no intervenor at any time

offered any evidence on these subjects. Indeed, with respect at least to fish and to interconnections as alternative sources of power, no intervenor raised any issue prior to the close of hearings (see Petitions to Intervene, A. 510, 516, 548, 554).

The rule prescribed by the opinion below would fly in the face of administrative procedure as prescribed by statute and by practical necessity. In any administrative proceeding, as in any judicial proceeding, there are literally an infinite variety of issues which can be conceived of by a pure logician. In any administrative or judicial proceeding these issues are narrowed by the fact that the parties cannot raise purely theoretical issues without assuming the burden of showing a practical relationship to the case. To take the instant proceeding, various rather exotic means of power generation exist on a theoretical basis, including thermoelectric generation, thermionic generation, and magneto-hydrodynamic generation. (See National Power Survey, Part II, pages 73-74, 78-79.) No party, however, raised these alternatives as an issue, for the simple reason that no practical basis could be found for doing so. Was the Commission in error in failing to make a record on this point notwithstanding the knowledge of its technical staff that these alternatives were, as a practical matter, absurd? Must a witness be found, sworn, and testify at length, to create a record on this subject under penalty of subsequent reversal by a Court of Appeals?

The example given is not fanciful. The Court of Appeals below applied this same type of rule with respect to interconnections as an alternative source of power. As pointed out above, the only evidence on this issue was that interconnections would not be an alternative source of

power. No intervenor ever offered evidence to the contrary nor, prior to the close of hearings, even suggested the contrary. However, as previously noted, the Court assumed as a fact that ample spinning reserve[8] would be available from Pennsylvania and New Jersey interconnections in the winter months, and starting from this premise wondered:

> "If interconnected power can replace the Storm King project in December, why was it not considered as a permanent alternative?" (Opinion 27a)

The question is not illogical, but wholly without practical basis. Anyone with a knowledge of basic fundamentals, including the Commission, its staff, and any potential qualified expert witness approached on the subject by any intervenor would be aware of the fact that Pennsylvania and New Jersey utilities are part of the Pennsylvania-New Jersey-Maryland Power Pool (FPC, National Power Survey Table 60, pp. 227-228) and that due to air conditioning demands this pool has a heavy summer peak load which it must provide capacity to meet (FPC Form No. 12 as filed with the FPC for Pa.-N. J.-Md. Interconnection, 1964, Schedule 14 p. 23 shows summer peak load of 900,000 kilowatts in excess of the maximum load occurring in December). The result is a surplus of capacity by the Pennsylvania and New Jersey companies in the winter, but not in the summer.

The example illustrates the inherent danger of letting the Courts frame the factual issues to be decided by the administrative agency. However logical, the Courts are

8. "Spinning reserve" is generating capacity held in reserve, not generating power but kept spinning so as to be immediately available in emergency. It is to be distinguished from "cold reserve" which may take several hours to be brought into operation (A. 255-256, 378-379).

technologically untrained and lack technical staff. If the view of the Court of Appeals herein should become law, it would require a court to adopt any plausible argument which some intervenor, freed from the responsibility imposed by having to seek evidence, may suggest.

The Court erred in suggesting that the only alternative is for the agency "to act as an umpire blandly calling balls and strikes". Clearly the agencies have an affirmative duty to protect the public interest, and to require applicants to present a *prima facie* case. This, however, should not be confused with a duty to compile a record of facts which the agency, with its background of expertise, recognizes is of no practical significance. The Commission is charged with the duty to protect the public interest, and has the technical expertise and staff to determine what issues merit examination in the public interest. If they are remiss, any party with a legitimate interest to protect has full right and opportunity to present evidence on any issue which the Commission has overlooked, but it has no right to require the Commission to affirmatively undertake the burden of seeking out evidence which the latter believes to be of no practical materiality. As applied to the instant case, with respect to issues not even raised by the intervenor until after issuance of the order, it not only imposes a burden of seeking out evidence, but imposes the insuperable burden upon Commission and applicant of trying to imagine every issue which might conceivably, after decision by a regulatory agency, be plausibly advanced to a reviewing court lacking the technical expertise of the agency.

The Administrative Procedure Act specifically provides in Section 7(c)

> "Except as statutes otherwise provide the proponent of a rule or order shall have the burden of proof * * *."

That this was meant to apply to intervenors, who are the proponents of a rule or order which would deny the license being sought, is made clear by the legislative history of the Act. The complete legislative history appears as Senate Document No. 248, 79th Congress, 2nd Session. In such report, at page 270 (being the report of the House Judiciary Committee, House Report No. 1980, 79th Congress, 2nd Session) it is stated:

> "That the proponent of a rule or order has the burden of proof means *not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence.* * * In other words, this section means that every proponent of a rule or order *or the denial thereof* has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated." (Emphasis supplied.)

This Court applied such a rule, in a completely analogous situation, in *ICC* v. *J-T Transport Co.*, 368 U. S. 81 (1961). In that case it was held that where an applicant for a certificate demonstrated the need for the proposed service, it was incumbent upon the protestant existing carriers to present evidence to show that they have the willingness and ability to meet that need. See 368 U. S. at 90.

The Federal Power Act, Section 10(a), does not require, as a condition precedent to the grant of a hydroelectric license, that there be no possible alternative source of power: it merely requires that the proposed project "shall be such *as in the judgment of the Commission* shall be best adopted to a comprehensive plan for improving or developing the waterway". Certainly a *prima facie* case on that point was created when applicant presented evidence upon which the Commission found that the project would not only create reliable power for which there was a demand (A. 699-700), but would also result in improvements in local recreational facilities (A. 701, 731), improvements in the scenery of the waterfront (A. 701-704), improvements in local water supply (A. 731, 739), and benefits to the local economy (A. 696-697). Based upon these findings, which were never questioned on review, the Commission clearly would have the power to exercise its judgment that the project was "best adopted" to a comprehensive plan for development of the waterway (See FPC Planning Status Report, Hudson River Basin, 1965) even if there were a completely adequate alternative power source. Certainly the Act throws no duty on either applicant or the Commission to show the absence of such alternative; to the extent the issue was relevant, it was the burden of those proponents of the denial of the license to come forward with the evidence on this, and any other issue, which in their views would militate denial.

In point of fact, even if it be assumed that the issues of alternative sources of power, effect on fish life and excessive cost of underground transmission were part of applicant's *prima facie* case, there seems no contention that there was not presented "substantial evidence" to justify the Commission's findings upon these points

(alternative source of power, A. 322-327, 332-368, 376-377, 396-398; underground transmission costs, A. 179, 189-194, 197-210, 225-234, 432-433; fish life, A. 26-28, 39-58, 493-497).

The rule espoused by the Court below, it is clear, contradicts the purpose and intent of the Administrative Procedure Act, which was itself the embodiment of a long history of experience regarding the necessity of sensibly limiting issues to those proposed and supported by the parties, with the agency itself through its staff constituting the party representing the public interest. Granting dilatory powers to intervenors seeking to grind their private axes is clearly not in the public interest, as the Court below apparently assumed, but directly contrary to the protection of those public interests for which administrative agencies are created.

b) Does an administrative order fail to meet the tests of the substantial evidence rule prescribed by the Administrative Procedure Act and the Federal Power Act, because the evidence of record was proffered by the petitioner for such order?

The Administrative Procedure Act, as noted above, throws upon the proponent for an order the burden of proving a *prima facie* case. In addition both the Administrative Procedure Act (Section 10(e)) and the Federal Power Act (Section 313(b)) limit the jurisdiction of Courts of Appeals to review Commission action, by making the Commission's factual determinations conclusive provided only that they are supported by "substantial evidence." The meaning of "substantial evidence" has been well established in the decision of this Court. *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197 (1938); *NLRB* v. *Columbia Enameling & Stamping Co.,* 306 U. S.

292 (1939). In the latter case, this Court stated (306 U. S. at 300);

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

The opinion below appears to establish a new qualification for the substantial evidence rule; substantial evidence cannot be supplied by the evidence offered by the proponent for a license nor can such evidence suffice to create a *prima facie* case. Thus, the Court of Appeals brushed aside the evidence with respect to cost of 345,000 volt underground transmission facilities presented by a Con Edison witness as "almost nothing", although it consisted of 48 pages of testimony and three exhibits giving the most detailed cost analysis (R. 615-647, 716-730, 1834-1837 [A. 190-211, 224-234, 430-433]) by a witness in charge of laying the only such facilities in existence (A. 101). The testimony of another expert witness on the adequacy of gas turbines (A. 396-398) was dismissed as "self-serving" because the witness was an "official of Con Edison." (Opinion, 21a.)

To apply to administrative agencies the ancient but now obsolete common law rule which disqualified a party as a witness (2 Wigmore on Evidence, 3rd Ed., §575) would frequently make an agency's task impossible. The present case clearly indicates the absurdity of result. The only

underground cable in the United States of 345,000 volts (the voltage of the line involved in this project) is that which has been laid by Con Edison (A. 101). However, in the view of the Court of Appeals, the detailed testimony, presented by the engineer in direct charge of constructing those lines (A. 189-194, 197-210, 225-234) apparently does not constitute "substantial evidence", which would make the Commission's findings on the subject conclusive under the statutes, because he is a Con Edison official (Opinion 28a-29a).

The example is not unique. Probably most administrative proceedings, whether they relate to rates, licenses or enforcement, require the testimony of interested witnesses on key issues. The Court of Appeals decision, while imposing new burdens on agencies and applicants with respect to adequacy of record, simultaneously cripples the agencies (and applicants) in creating such a record.

c) Where an administrative agency has refused after close of hearings to reopen a proceeding for further testimony on a technical subject upon which the agency has substantial background and on which both sides have submitted evidence, do Section 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act permit a Court of Appeals to reverse upon the ground that it does not consider the evidence of record "meaningful"?

The Lurkis additional testimony on gas turbines as an alternative power source was proffered by Scenic Hudson eleven months after the close of hearings and nearly one month after the issuance of the license. The Court of Appeals dismissed this laches by noting that such

testimony had been offered by another party two months previously (but eight months after the close of hearings), and stated that as "private attorney general" the appellant below can "raise issues not personal to it" (Opinion 21a).

Even accepting this dubious elevation of private special interest groups[9] to the position of "private attorney general", the decision below creates grave doubts as to the ability of an administrative agency to regulate its own proceedings in an orderly fashion, and is directly contrary to the decisions of this Court in *ICC* v. *Jersey City*, 322 U. S. 503 (1944) and *United States* v. *Pierce Auto Lines*, 327 U. S. 515 (1946).

Even in the case of a lower trial court, a petition to reopen a proceeding is a request for an extraordinary form of relief. It is addressed to the sound discretion of the tribunal, and will not be granted

> "unless (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching" (*English* v. *Mattson*, 214 F. 2d 406, 409 (5th Cir. 1954)).

Neither Scenic Hudson's application of April 8, 1965 (A. 777) nor the preceding tender to which the Court

9. It should be noted that referring to such groups as "non-profit conservationist organizations" (Opinion 2a) does not change the fact that they represent a special and in a strict sense a selfish interest. They wish public resources to be used solely to further their own aesthetic or recreational interests in fishing, hiking or similar activities. While such interests merit consideration, they are no more representative of a public interest than development of resources for supplying power to the consumer and jobs to the laborer. It is the function of the FPC under Section 10(a) of the Act, to weigh these sometimes competing selfish interests in determining the overall public benefit (A. 700, 734).

of Appeals referred (A. 652-663) met any of these tests. They offered merely further testimony by another witness, a Mr. Lurkis, about gas turbines as an alternative source of peaking energy for Con Edison. No reason was given why he was not offered earlier; while he was alleged to have been out of the country during the 1964 hearings, he was in the United States, and opining on this very subject, at least as early as November 19 and 20, 1964 (Opinion, 18a). It is obvious that Scenic Hudson in not offering its testimony until April, 1965, five months after having presented Mr. Lurkis at the legislative committee hearings, was merely waiting to see how the Commission would decide; this hardly meets the test of diligence, against which an application to reopen must be weighed.

The most basic failing, however, in the application was that the evidence offered was purely cumulative. This was not an offer of a witness to some hitherto unknown fact. It was an offer of an alleged expert to express an opinion on a subject, gas turbines, as to which the Commission had already heard substantial opinion evidence from duly qualified experts, including one offered by Scenic Hudson. The application may be serached in vain even for any novel theory which this "expert" would proffer and which had not been heard and considered by the Commission. The proffered testimony in no way dealt with the problem of spinning reserve (see p. 16, *supra*), which is one of the Cornwall project's primary functions (A. 121, 157-158, 289-290, 295, 368-369). It failed to meet any of the numerous objections to gas turbines demonstrated by the evidence of record (see p. 28 *infra*). Further, the Lurkis proposal required commitment of a firm supply of gas for use in generation of

electricity, a use which the Commission noted "would raise serious policy considerations," citing *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1961), wherein this Court upheld the Commission's determination that Con Edison could *not* acquire gas for such use (A. 714).

A regulatory commission, with its expertise in its field, and its policy making function, must have at least as much discretion on the question of reopening a proceeding as does a court. Certainly on this record it can hardly be said that the Commission abused that discretion in refusing to hear Mr. Lurkis. To the contrary, as this Court stated in *I.C.C.* v. *Jersey City*, 322 U. S. 503, 514-515 (1944):

> "* * * Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

This Court made the further comment that:

> "The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other Federal courts" (322 U. S. at 517),

and held that the fact that a proceeding was reopened for modification did not require a rehearing of the basic issue:

> "* * * Nor can a litigant insist that a commission may not take a second step in a rate-making process without retracing all previous ones" (322 U. S. at 517).

Similarly, in *United States* v. *Pierce Auto Lines,* 327 U. S. 515 (1946), this Court reversed a determination of a lower court which would have required the I.C.C. to reopen a certification proceeding to consider possible changed conditions. In its opinion, this Court distinguished *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248 (1932), saying (327 U. S. at 534-536):

> "That case, as has been indicated more than once, was 'promptly restricted * * * to its special facts, *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, and it stands virtually alone.' [citing cases] Except in the single instance, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City, supra. Only a showing of the clearest abuse of discretion could sustain an exception to that rule.* * * *
>
> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. *It is not true, as the opinion stated, that '* * * the courts must in a*

> *litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done.* Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law" (emphasis supplied).

Indeed, it should be recognized that but for this administrative discretion, the substantial evidence rule prescribed by the statutes would become a dead letter. This is so because any party objecting to a rule can always dredge up additional evidence which he can offer to contradict the substantial evidence of record. Were the Court of Appeals empowered to evaluate such proferred evidence and decide the Commission must receive it, the deference which the statutes require must be paid to administrative expertise, by prescribing the substantial evidence rule, would be defeated.[10]

The decisions in which the Courts have given due deference to agency expertise are not mere exercises in humility; they constitute a sensible recognition of realities. The agencies not only have a depth of experience in a

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10. *Washington Public Power Supply System* v. *FPC*, Nos. 18728, 18729, and 18731 decided March 24, 1966 by the Court of Appeals for the D.C. Circuit appears in direct conflict with the instant case. The Court there rejected the Secretary of Interior's contention that the FPC was required to reopen a licensing proceeding and make an "independent staff study" regarding the propriety of federal development.

particular field which is lacking in a court which must deal with questions of law ranging from aviation to zoning, but the agencies have technically trained staffs who can evaluate technical data.

The instant case clearly indicates the problem created when a technically untrained Court attempts to decide technical issues on the merits.

As the record indicates, the issue of whether gas turbines present a practical alternative to the Cornwall project as a source of power requires consideration of complex and technical issues such as the capacity, starting time, reliability, capital cost, B.T.U. rate, decibel levels, how well they are suited for spinning reserve, and factors related to air pollution.[11]

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11. The evidence before the Commission which it weighed in arriving at its decision, included such issues as:

unavailability of gas turbines in units of sufficiently large capacity to substitute for the 2,000,000 kilowatt Cornwall project (A. 324-325, 350-352, 355, 360-362, 369, 397, 714);

inability of gas turbines to start quickly enough to fulfill the spinning reserve (supra p. 16) function of the Cornwall project (A. 325, 341-343, 353-355, 364, 397, 713);

relative novelty of gas turbines as compared with the simple and proven Francis-type hydroelectric turbines of the Cornwall project, as effecting reliability of electric service to the public (A. 156-158, 340-341, 352, 397, 571-572, 699);

relative capital costs of gas turbines and Cornwall, including all auxiliary equipment, and how those are costs reflected in annual costs to the consumer (A. 21, 121-123, 339-340, 356-359, 364, 424-427, 451);

relatively high rate of fuel consumption of gas turbines (expressed in the number of units of heat, British Thermal Units, required to be supplied to the turbines as fuel in order for the gas turbines to create a kilowatt hour of electric energy) as making them prohibitively expensive to operate as a substitute for the Cornwall project (A. 325, 340, 355, 365-366, 451, 713);

the high noise levels (generally expressed in decibels) of the jet engine components of gas turbines as affecting their acceptability in an urban area (A. 351-352, 355, 360-362, 397-398);

the availability of natural gas in sufficient quantity to utilize in gas turbines, and the effect of the alternative fuel, kerosene, in increasing air pollution, as compared to the effect of Cornwall in alleviating such problem (A. 159-162, 355-356, 397, 699-700, 714).

The Commission and its staff of engineers could and did properly evaluate the evidence presented on these issues, in the light of its own background of expertise on the specific subject of gas turbines. The reference of the Court of Appeals to the extensive testimony on the subject of gas turbines as not being "meaningful" (Opinion 18a) reflects its lack of that technical assistance and expertise which the Commission had in its own staff. This may also account for the Court's being impressed with the unsworn statements[12] on this subject of an "expert" who has never been subjected to cross-examination. As this Court has recognized, however, conflicting opinions of experts are readily available, and are best weighed by the agency involved. In *Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940), a case involving oil field proration, the Court noted (310 U. S. at 583-584):

> "The record is redolent with familiar dogmatic assertions by experts equally confident of contradictory contentions. These touch matters of geography and geology and physics and engineering * * *.
>
> "Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it * * *. It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better." (310 U. S. at 583-584).

12. The reference (Opinion 18a) to Mr. Lurkis' "testimony" before a legislative committee is in error; all that was given was an unsworn statement, not subject to cross-examination.

In the present case, the FPC noted that Mr. Lurkis' testimony would at best be "a disagreement among experts" (A. 795), on a topic already fully considered. It certainly could not be said to abuse its discretion in rejecting such offer, unless some new rule of administrative procedure, some inverse rule of judicial expertise, entitles a Court of Appeals to weigh conflicting technical evidence and substitute its own opinion (Opinion 18a-21a).

d) Did the action taken by the Court of Appeals below in receiving and avowedly basing its decision on matter not in the record before the agency, and substituting its judgment for that of an expert administrative body, constitute a substantial extension beyond the restricted jurisdiction imposed on appellate courts by the Administrative Procedure Act and the Federal Power Act?

The Court of Appeals below received, as "a convenient source of information" (Opinion 3a) the record of hearings in May 1965 and the October 4, 1965 order resulting therefrom. It relied upon that record, made subsequent to the orders appealed from, in reaching its decision (Opinion 26a-27a, 32a).

It has been uniformly held that the record filed in a reviewing court shall include a transcript of the record upon which the order appealed was entered and nothing else. *Norris & Hirshberg* v. *SEC,* 163 F.2d 689 (D.C. Cir. 1947), *cert. den.,* 333 U. S. 867 (1948); *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. 2d 953, 966 (2d Cir. 1942), *cert. den.,* 319 U. S. 741 (1943), *Balazs* v. *Anderson,* 77 F. Supp. 612 (D.C. N.D. Ohio 1948).

There is more than a mere conceptual difficulty in seeing how a Commission order can be held to be erroneous

on the basis of evidence not before the Commission at the time such order was made; there are very practical objections to such a procedure.

Reference to extraneous matter deprives the parties of the protections of the testimonial process, including oath and cross-examination. Even if the material being considered consists of sworn testimony, where the hearing was specifically confined to limited issues (as at the May 1965 hearings) the cross-examination will be similarly limited.

The Administrative Procedure Act, Section 7(d) requires an agency to make its decisions on the record before it. Basic considerations of fairness should preclude the out-of-context use of extraneous material by a Court reviewing such decision.

Furthermore, Scenic Hudson which persuaded the Court to consider the record of hearings in May 1965 and the October 4, 1965 order, failed to take the statutory steps of application for rehearing (Section 313(a)), and petition for review (Section 313(b)), which are the jurisdictional prerequisites to the Court's consideration of the subject of those hearings. Such consideration was over the strenuous objection of both the Commission and the applicant for license. While the Court did not in express terms reverse the order of October 4, 1965, its procedure in reversing the other orders which were before it, in practical effect annulled the October 4, 1965 order without the jurisdictional prerequisites required by Section 313.

The receipt by the Court of such extraneous material as a basis for disputing the findings of the agency is also in direct conflict with the "substantial evidence" rule prescribed by Section 10(e) of the Administrative Procedure Act and Section 313(b) of the Federal Power Act. These statutes make the agency findings "conclusive" if supported by substantial evidence, and the Court cannot

reverse even if it finds certain evidence to the contrary in the record to be persuasive. It would be anomalous if the Court were free to reverse such agency findings, and substitute its own judgment, based upon conflicting evidence *not* in the record.

e) Does the Administrative Procedure Act, Section 10(e), and the Federal Power Act, §313(b), permit a reviewing Court to weigh evidence and substitute its judgment on factual issues for that of a Commission?

A reading of the opinion below as compared to the record before the Court below (see Statement herein, pp. 5-13 supra), demonstrates that the Court of Appeals avoided the effect of the substantial evidence rule prescribed by the two applicable statutes by finding the evidence "self-serving" (Opinion 21a) or not "meaningful" (Opinion 18a). It then proceeded to substitute its own judgment for that of the Commission on factual issues, not, to be sure, by saying that the converse finding must be made, but by remanding to the Commission with directions to affirmatively seek out contrary evidence.

If such a procedure is to be deemed consistent with the statutory restrictions on the Court's jurisdiction to review, then a substantial inroad has been made in the substantial evidence rule. A Court could as effectively kill an application for a license by delay, by continuing to remand until findings are made which accord with the Court's views, as it could by directly substituting its own findings of fact. The latter course would be kinder to both the agency and the parties. It is submitted, however, that neither should be permitted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RANDALL J. LEBOEUF, JR.,
Counsel for Petitioner.

Of Counsel:
ALFRED E. FROH,
LEBOEUF, LAMB & LEIBY,

March 28, 1966

Appendix A—Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 106—September Term, 1965.

(Argued October 8, 1965 Decided December 29, 1965.)

Docket No. 29853

SCENIC HUDSON PRESERVATION CONFERENCE, TOWN OF CORTLANDT, TOWN OF PUTNAM VALLEY and TOWN OF YORKTOWN,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

and

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Intervener.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Petition, pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. §825 *l* (b), to review and set aside certain orders of the Federal Power Commission granting intervener a license to construct a pumped storage hydroelectric project.

Orders set aside and case remanded for further proceedings in accordance with this opinion.

LLOYD K. GARRISON, New York City (Simon H. Rifkind, Albert K. Butzel, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, and Dale E. Doty, Washington, D. C., of counsel), *for Petitioner, Scenic Hudson Preservation Conference.*

SAMUEL L. SLUTZKY, Putnam Valley, N. Y., *for Petitioner, Town of Putnam Valley.*

JOHN C. TUTTLE, Peekskill, N. Y. on the brief, *for Petitioner, Town of Cortlandt.*

JOHN R. KIBBE and RAYMOND MARGLES, Yorktown Heights, N. Y., on the brief, *for Petitioner, Town of Yorktown.*

JOSEPHINE H. KLEIN, Washington, D. C. (Richard A. Solomon, General Counsel for Federal Power Commission, Howard E. Wahrenbrock, Sol., Melvin Spaeth, Asst. Gen. Counsel, Washington, D. C., on the brief), *for Respondent.*

RANDALL J. LEBOEUF, JR., New York City (LeBoeuf, Lamb & Lieby [sic], New York City, on the brief), *for Intervener.*

HAYS, *Circuit Judge*:

In this proceeding the petitioners are the Scenic Hudson Preservation Conference, an unincorporated association consisting of a number of non-profit, conservationist organizations, and the Towns of Cortlandt, Putnam Valley and Yorktown. Petitioners ask us, pursuant to §313(b) of the Federal Power Act, 16 U. S. C. §825 *l* (b), to set aside

three orders of the respondent, the Federal Power Commission:[1]

(a) An order of March 9, 1965 granting a license to the intervener, the Consolidated Edison Company of New York, Inc., to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York;

(b) An order of May 6, 1965 denying petitioners' application for a rehearing of the March 9 order, and for the reopening of the proceeding to permit the introduction of additional evidence;

(c) An order of May 6, 1965 denying joint motions filed by the petitioners to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines, and of the feasibility of *any* type of fish protection device.

A pumped storage plant generates electric energy for use during peak load periods,[2] using hydroelectric units

1. At oral argument petitioners made a motion to enlarge the record by including in it the supplemental hearings conducted before a Trial Examiner of the Federal Power Commission in May 1965. These hearings were limited to consideration of the routes of overhead transmission facilities and the design of fish protection devices. Petitioners allege that the May hearings divulge information which should have been developed and considered by the Commission at the time the license was granted. We are not being asked to review the October 4, 1965 order, setting forth the Commission's determination of the questions presented at the May hearings, but rather to consider evidence compiled at the May hearings as a convenient source of information from which inferences can be drawn about the completeness of the March 9 record. For this limited purpose we have granted petitioners' motion.

2. Capacity for peak load periods is that part of a system's generating equipment which is operated intermittently for short periods during the hours of highest daily, weekly, or seasonal kilowatt demand.

driven by water from a headwater pool or reservoir. The contemplated Storm King project would be the largest of its kind in the world. Consolidated Edison has estimated its cost, including transmission facilities, at $162,000,000. The project would consist of three major components, a storage reservoir, a powerhouse, and transmission lines. The storage reservoir,[3] located over a thousand feet above the powerhouse, is to be connected to the powerhouse, located on the river front, by a tunnel 40 feet in diameter. The powerhouse, which is both a pumping and generating station, would be 800 feet long and contain eight pump generators.[4]

Transmission lines would run under the Hudson to the east bank and then underground for 1.6 miles to a switching station which Consolidated Edison would build at Nelsonville in the Town of Philipstown. Thereafter, overhead transmission lines would be placed on towers 100 to 150 feet high and these would require a path up to 125 feet wide[5] through Westchester and Putnam Counties for a distance of some 25 miles until they reached Consolidated Edison's main connections with New York City.[6]

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3. The project's reservoir would contain a surface area of 240 acres and a usable capacity of 25,000 acre-feet. A part of the space which it would occupy is now occupied by a reservoir providing part of the water supply for the Village of Cornwall. Another area consisting of approximately 70 acres of property within the Black Rock Forest, a private forest reserve of Harvard University, would also be inundated by the proposed reservoir. Consolidated Edison has offered appropriate compensation for the acreage which would be used.

4. According to plans presented to the Federal Power Commission three pumping generator units would be installed and go into operation in mid-1967 and the remaining five in 1968.

5. However, the path might be even wider at corners, transportation points, access points, or points of an unusual character.

6. As has already been noted we are not now concerned with the order of October 4, 1965 in which the Commission established the exact route of the transmission lines and the width of the right-of-way.

During slack periods Consolidated Edison's conventional steam plants in New York City would provide electric power for the pumps at Storm King to force water up the mountain, through the tunnel, and into the upper reservoir. In peak periods water would be released to rush down the mountain and power the generators. Three kilowatts of power generated in New York City would be necessary to obtain two kilowatts from the Cornwall installation. When pumping the powerhouse would draw approximately 1,080,000 cubic feet of water per minute from the Hudson, and when generating would discharge up to 1,620,000 cubic feet of water per minute into the river. The installation would have a capacity of 2,000,000 kilowatts, but would be so constructed as to be capable of enlargement to a total of 3,000,000 kilowatts. The water in the upper reservoir may be regarded as the equivalent of stored electric energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall. See Federal Power Commission, *National Power Survey* 120-21 (1964).

The Storm King project has aroused grave concern among conservationist groups, adversely affected municipalities and various state and federal legislative units and administrative agencies.[7]

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7. For bills introduced in Congress for the purpose of preserving the Hudson River and adjacent areas see House Introduction No. H. R. 3012, 3918; Senate Introduction No. S. 1386. Hearings were held on May 10 and 11, 1965 before the House of Representatives Subcommittee on Fisheries and Wildlife Conservation. House of Representatives, 89th Cong., 1st Sess., on Hudson River Spawning Grounds.

The New York Joint Legislative Committee on Natural Resources held hearings on November 19 and 20, 1964. See Preliminary Report on the Joint Legislative Committee on Natural Resources, *On the Hudson River Valley and the Consolidated Edison Company Storm King Mountain Project* (issued February 16, 1965) (hereinafter cited *"Preliminary Report"*).

The Fish and Wildlife Service of the Department of the Interior and the New York State Conservation Department have expressed

To be licensed by the Commission a prosepective project must meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway," Federal Power Act §10(a), 16 U. S. C. §803(a). In framing the issue before it, the Federal Power Commission properly noted:

> "[W]e must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied."

If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. See *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 108 U. S. App. D. C. 409, 283 F. 2d 204, 226, cert. denied, *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 364 U. S. 913, 81

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concern about the effect of the project on the fish life of the Hudson. See Part IV *infra*.

Numerous conservationist groups have interested themselves in the project, and many of them filed formal petitions to intervene before the Commission.

S. Ct. 276, 5 L.Ed. 2d 227 (1960). Petitioners' application, pursuant to §313(b), 16 U.S.C. §825 *l* (b), to adduce additional evidence is granted.[8] We set aside the three orders of the Commission to which the petition is addressed and remand the case for further proceedings in accordance with this opinion.

I.

The Storm King project is to be located in an area of unique beauty and major historical signficance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it "finer than the Rhine." Petitioners' contention that the Commission must take these factors into consideration in evaluating the Storm King project is justified by the history of the Federal Power Act.

The Federal Water Power Act of 1920, 41 Stat. 1063 (1920) (now Federal Power Act, 16 U. S. C. §791a et seq.), was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources. See *Federal Power Comm'n* v. *Union Electric Co.*, 381 U. S. 90, 98-99, 85 S. Ct. 1253, 14 L.Ed. 2d 239 (1965); *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 180, 66 S. Ct. 906, 90 L.Ed. 1143 (1946). See generally Cushman, *The Independent Regulatory Commission*, 275-283 (1941); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*,

8. The hearings to which the third order refers have already been held; however, the relief petitioners seek is provided by our determination as to the second order.

14 Geo. Wash. L. Rev. 9 (1945).[9] It "was passed for the purpose of developing and preserving to the people the water power resources of the country." *United States ex rel. Chapman* v. *Federal Power Comm'n*, 191 F. 2d 796, 800 (4th Cir. 1951), aff'd, 345 U. S. 153, 73 S. Ct. 609, 97 L.Ed. 918 (1953).

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9. The Supreme Court has noted that:

"The movement toward the enactment of the Act in 1920 may be said to have taken its keynote from President Roosevelt's veto of a bill which would have turned over to private interests important power sites on the Rainy River." *Federal Power Comm'n* v. *Union Electric Co.*, 381 U. S. 90, 98-99 n. 11, 85 S. Ct. 1253, 1258 (1965).

President Roosevelt's veto message read:

"We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power." 42 Cong. Rec. 4698 (1908).

See also President Roosevelt's veto of the James River bill, H. R. 17767, 60th Cong., 2d Sess. (1909), veto message, 43 Cong. Rec. 978 (1909); President Roosevelt's letter appointing the Inland Waterways Commission, 42 Cong. Rec. 6968 (1908), which read in part:

"Works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters.

* * * * *

"[The plans of the Commission should be formulated] in the light of the widest knowledge of the country and the people, and from the most diverse points of view."

Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility. *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 180-81, 66 S. Ct. 906, 919 (1946) ("instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted"); *National Hells Canyon Ass'n* v. *Federal Power Comm'n*, 99 U. S. App. D. C. 149, 237 F. 2d 777 (1956), cert. denied, 353 U. S. 924, 77 S. Ct. 681, 1 L.Ed. 2d 720, rehearing denied, 353 U. S. 978, 77 S. Ct. 1054, 1 L.Ed. 2d 1139 (1957).

Section 10(a) of the Federal Power Act, 16 U. S. C. §803(a), reads:

"§803. Conditions of license generally.

> All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:
>
> • • • • •
>
> (a) That the project adopted, . . . shall be such as in the judgment of the Commission *will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes;* and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." (Emphasis added.)

"Recreational purposes" are expressly included among the beneficial public uses to which the statute refers. The phrase undoubtedly encompasses the conservation of nat-

ural resources, the maintenance of natural beauty, and the preservation of historic sites.[10] See *Namekagon Hydro Co.* v. *Federal Power Comm'n,* 216 F. 2d 509, 511-12 (7th Cir. 1954). All of these "beneficial uses," the Supreme Court has observed, "while unregulated, might well be contradictory rather than harmonious." *Federal Power Comm'n* v. *Union Electric Co.,* 381 U. S. 90, 98, 85 S. Ct. 1253, 1258 (1965). In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.

In recent years the Commission has placed increasing emphasis on the right of the public to "out-door recreational resources." 1964 F. P. C. Report 69. Regulations issued in 1963, for the first time, required the inclusion of a recreation plan as part of a license application. F.P.C. Order No. 260-A, amending §4.41 of Regulations under Federal Power Act, issued April 18, 1963, 29 F. P. C. 777, 28 Fed. Reg. 4092. The Commission has recognized generally that members of the public have rights in our recreational, historic and scenic resources under the Federal Power Act. *Namekagon Hydro Co.,* 12 F. P. C. 203, 206 (1954) ("the Commission realizes that in many cases where unique and most special types of recreation are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents"). In affirming *Namekagon* the Seventh Circuit upheld the Commission's denial

10. The clear intention of Congress to emphasize "recreational purposes" is indicated by the fact that subsection (a) was amended in 1935 by substituting the present language "plan for improving or developing * * * including recreational purposes" for "scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses." Senate Rep. No. 621, 74th Cong., 1st Sess., page 45 stated that the amendment was intended to add "an express provision that the Commission may include consideration of recreational purposes."

of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a "beautiful stretch of water" were threatened. *Namekagon Hydro Co.* v. *Federal Power Comm'n,* 216 F. 2d 509, 511-12 (7th Cir. 1954).

Commissioner Ross said in his dissent in the present case: "[I]t appears obvious that had this area of the 'Hudson Highlands' been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it."

II.

Respondent argues that "petitioners do not have standing to obtain review" because they "make no claim of any personal economic injury resulting from the Commission's action."

Section 313(b) of the Federal Power Act, 16 U. S. C. §825 *l* (b) reads:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located. . . ."

The Commission takes a narrow view of the meaning of "aggrieved party" under the Act. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ." *United States ex rel. Chapman* v. *Federal Power Comm'n,* 345 U. S. 153, 156, 73 S. Ct. 609, 612, 97 L. Ed. 918 (1953).

Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III §2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. See *State of Washington Dept. of Game* v. *Federal Power Comm'n,* 207 F. 2d 391 (9th Cir. 1953), cert. denied, 347 U. S. 936, 74 S. Ct. 626, 98 L. Ed. 1087 (1954); *Reade* v. *Ewing,* 205 F. 2d 630 (2d Cir. 1953); cf. *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n,* 316 U. S. 4, 62 S. Ct. 875, 86 L. Ed. 1229 (1942); *Federal Communications Comm'n,* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869 (1940); *International Union of Electrical, Radio and Machine Workers* v. *Underwood Corp.,* 219 F. 2d 100, 103 (2d Cir. 1955); *Associated Industries, Inc.* v. *Ickes,* 134 F. 2d 694 (2d Cir.), vacated as moot, 320 U. S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943); Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255 (1961). Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest. See, e.g., *School District of Abington Township* v. *Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Engel* v. *Vitale,* 370 U. S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962); *Zorach* v. *Clauson,* 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952).

In *State of Washington Dept. of Game* v. *Federal Power Comm'n,* 207 F. 2d 391, 395 n. 11 (9th Cir. 1953), cert. denied, 347 U. S. 936, 74 S. Ct. 626 (1954), the Washington State Sportsmen's Council, Inc., a non-profit organization

of residents, the State of Washington, Department of Game, and the State of Washington, Department of Fisheries, opposed the construction of a dam because it threatened to destroy fish. The Federal Power Commission granted the license; the interveners applied for a rehearing which the Commission denied. Petitioners asked for review under §313(b) and the court upheld their standing, noting:

> "All are 'parties aggrieved' since they claim that the Cowlitz Project will destroy fish in [sic] which they, among others, are interested in protecting."

The Federal Power Act seeks to protect non-economic as well as economic interests.[11] Indeed, the Commission recognized this in framing the issue in this very case:

> "The project is to be physically located in a general area of our nation steeped in the history of the American Revolution and of the colonial period. It is also a general area of great scenic beauty. The principal issue which must be decided is whether the project's effect on the scenic, historical and recreational values of the area are such that we should deny the application."

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under §313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special

11. See discussion in Part I, *supra*.

interests. See *State of Washington Dept. of Game* v. *Federal Power Comm'n, supra.*

At an earlier point in these proceedings the Commission apparently accepted this view. Consolidated Edison strongly objected to the petitioners' standing, but the Commission did not deny their right to file an application for a rehearing under §313(a) of the Act which also speaks in terms of "aggrieved parties."[12]

Moreover, petitioners have sufficient economic interest to establish their standing. The New York-New Jersey Trail Conference, one of the two conservation groups that organized Scenic Hudson, has some seventeen miles of trailways in the area of Storm King Mountain. Portions of these trails would be inundated by the construction of the project's reservoir.

The primary transmission lines are an integral part of the Storm King project. See Federal Power Act §3(11), 16 U. S. C. §796(11).[13] The towns that are co-

12. Federal Power Act, §313(a), 16 U. S. C. §825 *l* (a) reads: "§825 *l.* Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."

13. Federal Power Act §3(11), 16 U. S. C. §796(11) reads: "'[P]*roject' means complete unit of improvement* or development, *consisting of* a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, *the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,* all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." (Emphasis added.)

petitioners with Scenic Hudson have standing because the transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and significantly interfere with long-range community planning. See *City of Pittsburgh* v. *Federal Power Comm'n*, 99 U. S. App. D. C. 113, 237 F. 2d 741, 748 (1956). Yorktown, for example, fears that the transmission lines would run over municipal land selected for a school site, greatly decreasing its value and interfering with school construction. Putnam Valley faces similar interference with local planning and a substantial decrease in land tax revenues.[14]

We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings. We rejected a similar contention in *Associated Industries, Inc.* v. *Ickes*, 134 F. 2d 694, 707 (2d Cir.), vacated as moot, 320 U. S. 707, 64 S. Ct. 74 (1943), noting that "no such horrendous possibilities" exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.

In any case, the Federal Power Act creates no absolute right of intervention; §308(a), 16 U. S. C. §825g(a), reads:

> "In any proceeding before it, the Commission, in accordance with such rules and regulations as it

14. Permitting the Commission, for reasons of convenience and practicality, to limit the licensing proceeding and to hold for later determination the route of transmission lines, does not divest the petitioning towns of their standing. If we accepted the Commission's contrary argument we would be required to withdraw from the towns their right to challenge the entire integrated project.

Although the order of October 4, 1965 is not before us for review, we note that the Commission has conceded in its Supplemental Brief that Putnam Valley is in the same position as before the order and that the transmission route chosen "might be sufficient to cause aggrievement" to petitioner, Yorktown.

> may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

Since the right to seek review under §313(a) and (b) is limited to a "party" to the Commission proceeding, the Commission has ample authority reasonably to limit those eligible to intervene or to seek review. See *Alston Coal Co.* v. *Federal Power Comm'n,* 137 F. 2d 740, 742 (10th Cir. 1943). Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

III.

The Federal Power Act §313(b), 16 U. S. C. §825 *l* (b), reads in part:

> "(b) If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

The Commission in its opinion recognized that in connection with granting a license to Consolidated Edison it "must compare the Cornwall project with any alternatives that are available." There is no doubt that the Commis-

sion is under a statutory duty to give full consideration to alternative plans. See *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 108 U. S. App. D.C. 409, 283 F. 2d 204, 224-226, cert. denied, *Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 364 U. S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960); *City of Pittsburgh* v. *Federal Power Comm'n*, 99 U. S. App. D.C. 113, 237 F. 2d 741 (1956).

In *City of Pittsburgh*, three months after the hearings were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative suggestion. The District of Columbia Circuit set aside the Commission's order and remanded the case with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. The court stated that:

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." *City of Pittsburgh* v. *Federal Power Comm'n*, 99 U. S. App. D.C. 113, 237 F. 2d 741, 751 n. 28 (1956).

In the present case, the Commission heard oral argument on November 17, 1964, on the various exceptions to the Examiner's report. On January 7, 1965 the testimony of Mr. Alexander Lurkis, as to the feasibility of an alternative to the project, the use of gas turbines, was offered to the Commission by Hilltop Cooperative of Queens, a taxpayer and consumer group. The petition to intervene and present this new evidence was rejected on January 13, 1965 as not "timely." It was more than two months after

the offer of this testimony, on March 9, 1965, that the Commission issued a license to Consolidated Edison. When Mr. Lurkis's testimony was subsequently reoffered by the petitioners on April 8, 1965, it was rejected because it represented "at best" a "disagreement between experts." On the other hand, we have found in the record no meaningful evidence which contradicts the proffered testimony supporting the gas turbine alternative.

Mr. Lurkis is a consulting engineer of thirty-nine years experience. He has served as Chief Engineer of the New York City Bureau of Gas and Electric, in charge of a staff of 400, and as Senior Engineer of the New York City Transit Authority, where he supervised the design and construction of power plants.[15] The New York Joint Legislative Committee on Natural Resources,[16] after holding hearings on the Storm King project on November 19 and 20, 1964, summarized Mr. Lurkis's testimony as follows:

> "Mr. Alexander Lurkis * * * presented a detailed proposal for using gas turbines. This, he claimed, would meet the alleged peaking need of Con Ed and result in a saving for its customers of $132,000,000. The Committee has learned that similar gas turbine installations are now in use or proposed for use by a number of progressive electric utilities throughout the nation. In addition to meeting the alleged peak power needs and saving money for the ratepayer, the gas turbines proposed by Mr. Lurkis would have the following advantages:

15. Mr. Lurkis has made numerous studies of utility adequacy including a survey of "blackouts" in New York during 1959 and 1961, which resulted in revisions of the Consolidated Edison system. He is a member of many professional associations and has published numerous articles and presented many papers on electrical engineering subjects.

16. A total of 107 witnesses were heard; the large majority objected to the project.

> 1) Permit the company greater flexibility in meeting the power needs of its service area. Admittedly, technological developments in power production are changing and improving this field at such a rapid rate that it may well be entirely revolutionized in 10 to 15 years. There are obvious advantages in the gas turbine installations. Small installations can be added as needed to meet demand. This, in contrast to a single, giant, permanent installation such as Con Ed proposes at Storm King Mountain, which would tie the technology and investment of one company to a method of power production that might be obsolete in a few years.
>
> 2) Keep the power production facilities within New York City. This would not only avoid the desecration of the Hudson Gorge and Highlands, but, also, would eliminate the great swathe of destruction down through Putnam and Westchester Counties and their beautiful suburban communities." *Preliminary Report* at 6.

The Committee report, issued on February 16, 1965, three weeks before the license to Consolidated Edison was granted, concluded:

> "[T]he whole situation involved in the Consolidated Edison Storm King Mountain project, and the protection of the Hudson River and its shores, requires further and extensive study and investigation.
>
> • • • • •
>
> This Committee goes on record as opposing Con Ed's application until there has been adequate study of the points indicated in this report." *Preliminary Report* at 8.

Mr. Lurkis's analysis was based on an intensive study of the Consolidated Edison system, and of its peaking

needs projected year by year over a fifteen year period. He was prepared to make an economic comparison of a gas turbine system (including capital and fuel operating costs) and the Storm King pumped storage plant. Moreover, he was prepared to answer Consolidated Edison's objections to gas turbines by indicating:

(1) that gas turbines could meet Consolidated Edison's reserve needs;

(2) that the blackouts of 1959 and 1961 were caused by breakdowns in distribution, not by a lack of power;

(3) that gas turbines would avoid the hazards of weather damage to high transmission lines involved in the Storm King project;

(4) that since 3 kilowatts of power must be generated by steam plants in New York City in order to get 2 kilowatts of power from the Storm King project, gas turbines would be even more useful than the project in reducing air pollution;

(5) that noise from the turbines would be at acceptable industrial levels.

Other benefits envisioned from gas turbines were higher reliability, increased system flexibility, and possible savings in transmission line investment.[17]

17. Citing *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 81 S. Ct. 435, 5 L. Ed. 2d 377 (1961) the Commission asserts that "serious policy questions" would be raised by the use of gas, for the generation of electrical energy. But the serious questions alluded to do not excuse the Commission's failure to develop and hear pertinent evidence on the alternative. As to the use of gas, the Supreme Court held in *Transcontinental* that "a flexible balancing process, in the course of which all factors are weighed prior to final determination," is needed in each case. *Id.* at 23, 81 S. Ct. at 447.

Aside from self-serving general statements by officials of Consolidated Edison, the only testimony in the record bearing on the gas turbine alternative was offered by Ellery R. Fosdick. Fosdick's hastily prepared presentation considered turbines driven by steam and liquid fuel as well as gas; his direct testimony occupied less than ten pages of the record.[18] Fosdick's testimony was too scanty to meet the requirement of a full consideration of alternatives. Indeed, under the circumstances, we must conclude that there was no significant attempt to develop evidence as to the gas turbine alternative; at least, there is no such evidence in the record.

The Commission argues that petitioners made "no attempt to secure additional testimony." Yet the record indicates that more than two months before the license was granted the Commission summarily rejected the offer of Mr. Lurkis's testimony.

It is not our present function to evaluate this evidence. Our focus is upon the action of the Commission. The fact that Lurkis's testimony was originally offered by a non-petitioner, Hilltop Cooperative, is irrelevant. A party acting as a "private attorney general" can raise issues that are not personal to it. See *Associated Industries, Inc.* v. *Ickes,* 134 F. 2d 694, 705 (2d Cir.), vacated as moot, 320 U. S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943); Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255, 283 (1961) ("the right to

18. Fosdick conceded that he had no firsthand knowledge of the Consolidated Edison system or its requirements. He had been unable to make a study of the economics of alternative methods of generating peaking power, nor had he made an examination of New York City power needs. His testimony on air pollution, which was favorable to Consolidated Edison, was addressed to a question on the "burning of kerosene" and not of natural gas, a non-pollutant.

attack an order resting on a record made by others, or no record at all, could be valuable").

Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the Lurkis testimony, as well as proffered information on fish protection devices and underground transmission facilities,[19] exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives. *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 108 U. S. App. D.C. 409, 283 F. 2d 204, 224, 226, cert. denied, 364 U. S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960); *City of Pittsburgh* v. *Federal Power Comm.*, 99 U. S. App. D.C. 113, 237 F. 2d 741 (1956).

IV.

The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility. See Federal Power Act §10(a), 16 U. S. C. §803(a). The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. As Commissioner Ross said in his dissent:

> "I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The thread running through this case has been that the applicant is entitled to

19. See Part IV *infra*.

> a license upon making a prima facie case. My own personal regulatory philosophy compels me to reject this approach. This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should be possible to resolve all doubts as to alternative sources. This may have been done but the record doesn't speak. Let it do so."

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 108 U. S. App. D. C. 409, 283 F. 2d 204, 224, 226, cert. denied, 364 U. S. 913, 81 S. Ct. 276 (1960); *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S. D. N. Y. 1951), aff'd by an equally divided court, *A/S J. Ludwig Mowinckels Rederi* v.

Isbrandtsen Co., 342 U. S. 950, 72 S. Ct. 623, 96 L. Ed. 706 (1952); Friendly, *The Federal Administrative Agencies*, 144 (1962); Landis, *The Administrative Process*, 36-46 (1938); cf. *City of Pittsburgh* v. *Federal Power Comm.*, 99 U. S. App. D.C. 113, 237 F. 2d 741 (1956).

In *Michigan Consolidated Gas Co.* v. *Federal Power Comm., supra* 283 F. 2d at 224, the Court of Appeals of the District of Columbia, in criticizing the Federal Power Commission for refusing to consider an alternative and for failing to take the initiative in seeking information, observed:

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, *the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment*." (Emphasis added.)

On rehearing the court added:

> "In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.
>
> Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." *Id.* at 226.

Judge Frank, in response to a submission similar to the one made here, said:

> "This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: '* * * The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible * * *.'"

Isbrandtsen Co. v. *United States,* 96 F. Supp. 883, 892 (S. D. N. Y. 1951), affirmed by an equally divided court, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U. S. 950, 72 S. Ct. 623 (1952).

And Dean Landis said:

> "For [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." Landis, *The Administrative Process* 39 (1938).

In addition to the Commission's failure to receive or develop evidence concerning the gas turbine alternative, there are other instances where the Commission should have acted affirmatively in order to make a complete record.

The Commission neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information. The record sets forth Consolidated Edison's interconnection with a vast network of other utilities, but the Commission dismissed this alternative by noting that "Con Edison is relying fully upon such interconnections in estimating its future available capacity." However, only ten pages later in its opinion the Commission conceded:

> "Of significant importance, in our opinion, is the absence in the record, or the inadequacy, of information in regard to Con Edison's future interconnection plans; its plans, if any, for upgrading existing transmission lines to higher voltages; and of its existing transmission line grid in this general area and its future plans."

Moreover, in its October 4, 1965 order, the Commission in explaining how Consolidated Edison would be able to send "substantial amounts" of Storm King power to upstate New York and New England power companies, each December, said:

> "ample spinning reserve would be available during the winter from the interconnected companies in New Jersey and Pennsylvania, including the 'mine-mouth' plants. Thus, even at times of the greatest diversion of Cornwall power, Con Edison would have other power sources immediately available to it for its peak requirements."

If interconnecting power can replace the Storm King project in December, why was it not considered as a permanent alternative?

Commissioner Ross in his dissent said:

> "In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. There are two possibly differing sources; one would be purchasing pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power from new large scale thermal stations in Pennsylvania or in Appalachia."

There is no evidence in the record to indicate that either the Commission or Consolidated Edison ever seriously considered this alternative.[20] Nor is there any evidence that a combination of devices, for example, gas turbine and interconnections, were considered. Indeed, the Commission stated in its brief that it is "of doubtful relevance to the present case whether there are practical alternatives to an appropriate use of water power by which Con Ed could meet its anticipated needs for peaking power with generally comparable economy." The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.

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20. At page 39 of the record Mr. M. L. Waring, senior vice-president of Consolidated Edison, described the inter-connection system but failed to answer the question: "Would this not be an economical substitute for the pumped storage project?" In later testimony to a similar question he responded: "Yes, [other sources of power] are available, but not in sufficient quantity."

But there was no evidence introduced as to the amount of power available.

In its March 9 opinion the Commission postponed a decision on the transmission route to be chosen until the May 1965 hearings were completed. Inquiry into the cost of putting lines underground was precluded because the May hearings were limited to the question of overhead transmission routes. The petitioners' April 26, 1965 motion to enlarge the scope of the May hearing was denied. The Commission insisted that the question of underground costs had been "extensively considered." We find almost nothing in the record to support this statement.[21]

Consolidated Edison estimated the cost of underground transmission at seven to twelve times that of overhead lines.[22] These estimates were questioned by the Commission's own staff, which pointed out that Consolidated Edison's estimates incorrectly assumed that the underground route would be the same as the overhead; in fact, an underground route along the New York Central right-of-way would be clearly less costly than the estimate, since there

21. The Commission contends that petitioners failed to raise the issue of underground transmission line costs, and the bearing of these costs on the licensing of the project, in their Application for Rehearing. But in listing Commission errors, petitioners said:

> "finally it excluded from the consideration of . . . where to put the transmission lines the deeper questions of . . . what the cost would be of putting additional portions of the transmission lines underground."

The Philipstown Citizens Association, in its Application for Rehearing, specifically urged that the "Commission committed error in excluding further consideration of underground transmission at the remand hearings which started on May 4, 1965."

As we said earlier, the petitioners may raise issues which are not personal to them.

22. Compare Federal Power Commission, *National Power Survey* 156 (1964). ("Efforts are frequently made to require utilities to place transmission circuits underground. In some circumstances buried cables are advantageous, but the usual cost is 5 to 10 times that of overhead circuits.")

are no large differences of elevation requiring special pumping facilities and no new cross-country right-of-way would be necessary. Moreover, the staff noted that the estimates were based on Consolidated Edison's experience in New York, where excavation and other costs are higher. The Examiner noted the staff's reservations in his opinion, but since no alternative figures had been presented, he accepted those submitted by Consolidated Edison, as did the Commission.[23]

Consolidated Edison witnesses testified that the Storm King project would result in annual savings of $12,000,000 over a steam plant of equivalent capacity. Given these savings, the Commission should at least have inquired into the capital and annual cost of running segments of the transmission line underground in those areas where the overhead structures would cause the most serious scenic damage. We find no indication that the Commission seriously weighed the aesthetic advantages of underground transmission lines against the economic disadvantages.[24]

At the time of its original hearings, there was sufficient evidence before the Commission concerning the danger to fish to warrant further inquiry. The evidence included a letter from Kenneth Holum, Assistant Secretary of the De-

23. The Commission did state the underground costs would be prohibitive "except for short distances," but no substantiation of this position was offered nor was a definition of short distance given.

24. Commissioner Ross remarked that "the tactics of [Consolidated Edison] were obviously dictated by the precedential effect of underground transmission." See testimony of senior vice-president Waring. "[T]here are thousands of miles of transmission and distribution lines elsewhere in our territory and in the State of New York, where there is just as much or more reason to put the transmission lines underground as there is here."

This approach is unacceptable. Each case must be judged on its own merits. The area involved here is an area of *"unique beauty,"* as Commissioner Ross noted in his dissenting opinion.

partment of the Interior, and a statement made for the record by Robert A. Cook, on behalf of the New York State Water Resources Commission in which Mr. Cook said: "[T]he possibility still exists that extensive losses of eggs and/or young of valuable species might occur after installation of the proposed screening devices."

Just after the Commission closed its proceedings in November the hearings held by the New York State Legislative Committee on Natural Resources alerted many fisherman groups to the threat posed by the Storm King project. On December 24 and 30, January 8, and February 3 each of four groups, concerned with fishing, petitioned for the right to intervene and present evidence. They wished to show that the major spawning grounds for the distinct race of Hudson River striped bass was in the immediate vicinity of the Storm King project and not "much farther upstream" as inferred by Dr. Perlmutter, the one expert witness called by Consolidated Edison; to attempt to prove that, contrary to the impression given by Dr. Perlmutter, bass eggs and larvae float in the water, at the mercy of currents; that due to the location of the spawning ground and the Hudson's tidal flow, the eggs and larvae would be directly subject to the influence of the plant and would be threatened with destruction; that "no screening device presently feasible would adequately protect these early stages of fish life" and that their loss would ultimately destroy the economically valuable fisheries. Their evidence also indicated that in the case of shad, the young migrate from their spawning grounds, down past Cornwall, and being smaller than

the meshes of the contemplated fish screens, would be subject to the hazards already described.[25] The Commission rejected all these petitions as "untimely," and seemingly placing great reliance on the testimony of Dr. Perlmutter, concluded:

> "The project will not adversely affect the fish resources of the Hudson River provided adequate protective facilities are installed."

Although an opportunity was made available at the May hearings for petitioners to submit evidence on protective designs, the question of the adequacy of *any* protective design was inexplicably excluded by the Commission.

Recent events illustrate other deficiencies in the Commission's record. In hearings before the House Subcommittee on Fisheries and Wildlife Studying the Hudson River Spawning Grounds, 89th Cong. 1st Sess., May 10, 11, 1965, Mr. James McBroom, representing the Department of the Interior, stated:

> "Practical screening methods are known which could prevent young-of-the-year striped bass and shad from being caught up in the [Storm King] project's pumps, but practical means of protection of eggs and larvae stages have yet to be devised. Furthermore the location of the proposed plant appears from available evidence to be at or very

25. The Committee concluded:

"The Hudson River is a spawning ground for shad and striped bass. A multi-million dollar fishing industry, both commercial and sport, has been built on this process of nature . . . The Joint Legislative Committee . . . goes on record as being unalterably opposed to the granting of Con Ed's application, until such time as there is definite, impartial and conclusive proof that the project will not have an adverse effect on the fish life and spawning process upon which the fishing industry depends for its livelihood." *Preliminary Report 7.*

> near the crucial spot as to potential for harm to the overall production of eggs and larvae of the Hudson River striped bass. The cumulative effect of unmitigated loss of eggs and larvae of striped bass by this power project could have a serious effect on the Hudson River striped bass fishery and the dependent fisheries around Long Island and offshore."

Mr. E. L. Cheatum, representing the New York State Conservation Department, gave similar testimony. At the May hearings the testimony of Mr. Walburg and Mr. Wagner, witnesses for the Department of Interior, and Dr. Raney and Mr. Massmann, witnesses for Scenic Hudson, was substantially to the same effect. Indeed, the Commission in its October 4 order acknowledged that the protective device to which it had previously referred favorably (March 9 order) "may not be adequate to provide the protection required" (October 4 order).

On remand, the Commission should take the whole fisheries question into consideration before deciding whether the Storm King project is to be licensed.

The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, cost, public convenience and necessity, and absence of reasonable alternatives. Of course, the Commission should make every effort to expedite the new proceedings.

Petitioners' application, pursuant to Federal Power Act §313(b), 16 U. S. C. §825 *l* (b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.

The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.

Appendix B—Statutes Involved

ADMINISTRATIVE PROCEDURE ACT

SEC. 7(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

SEC. 7(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 10(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

FEDERAL POWER ACT

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require

the modification of any project and of the plans and specifications of the project works before approval.

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the

order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judg-

ment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).*

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* Sections 239 and 240 of the Judicial Code (28 U.S.C. 346 and 347) were repealed and were replaced by 28 U.S.C. 1254 (62 Stat. 928, 926).